Supreme Court, U.S.
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87-1501

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

FARWEST STEEL CORPORATION, Petitioner,

v.

BARGE SEA-SPAN 241, aka
Barge Ceres, her tackle, gear, and
furnishings in rem; and
WEST COAST CHARTERS, INC.,
a corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a steel supplier delivering steel to a repair yard for use in repairing a vessel has furnished necessaries "upon the order of the owner" or a "person authorized by the owner" within the meaning of the Maritime Lien Act, 46 USC §971, thus being entitled to a lien on the barge.

2. Whether a maritime lien claimant must objectively prove reliance on the credit of the vessel, even though 46 USC §971 provides that "it shall not be necessary to allege or prove that credit was given to the vessel."

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties to the proceeding in the court below, with the exception of Shuman Equipment, plaintiff-intervenor-appellant below.

Farwest Steel Corporation is an Oregon corporation. The stock is owned by Fischer Marcola Co., an Oregon general partnership. The partners are Dale Fischer and Ruth Dodd Fischer.

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DECISIONS BELOW

The decisions of the courts below, beginning with the most recent decision of the court of appeals, are as follows:

Farwest Steel Corporation, et al. v. Barge Sea-Span 241 [Farwest II], 828 F2d 522 (9th Cir. 1987), App. 56.

Farwest Steel Corporation, et al., v. Barge Sea-Span 241, 1987 AMC 934 (D.Or 1986), App. 5024.

Farwest Steel Corporation, et al. v. Barge Sea-Span 241 [Farwest I], 769 F2d 620 (9th Cir. 1985), App. 24;

Farwest Steel Corporation, et al. v. Barge Sea-Span 241, 1985 AMC 404, (D. Or. 1984), App. 1.

THIS COURT'S JURISDICTION

The decision of the Court of Appeals was made and entered on September 18, 1987.

An order denying rehearing was made and entered on December 7, 1987.

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 USC §1254(1).

STATUTES INVOLVED

Two sections of the Maritime Lien Act, 46 USC §§971-975, are involved:

46 USC §971 - Any persons furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall

not be necessary to allege or prove that credit was given to the vessel.

46 USC §972 - The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, or other necessaries for the vessel: the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

STATEMENT OF THE CASE

1. **Facts.** On June 15, 1980, respondent's predecessor, Lakeview Charters, purchased the wrecked Canadian oceangoing barge SEA-SPAN 241, renamed the CERES. Because of the extensive damage, upon completion of repairs,

United States registration was available. 46 USC §14. Nichols Boat & Barge Builders, Inc. located on the Columbia River, at Vancouver, Washington, was asked to bid on the barge repair contract. Nichols asked Farwest Steel Corporation, a steel supply company located in Eugene, Oregon, to quote on the steel that would be needed. Owners were cautioned about Nichols' capability to perform the repair contract. App. 9 As a consequence, certain provisions were added to the repair contract, including a provision that materials became the property of the owner on delivery to Nichols' yard. App. 10-11. Nichols was awarded the contract and ordered the steel for the barge from Farwest. Farwest considered Nichols not creditworthy and set up a special procedure so that the steel being

shipped to Nichols for the barge was separately invoiced with each order. App. 12-14. Farwest only supplied the steel because it believed it would have a lien on the barge. Separate purchase orders were issued for each project. On delivery, the steel for the barge was segregated. App. 14. Farwest sent monthly statements to Nichols. There was no direct contact between Farwest and the barge owners. Farwest delivered the steel to Nichols' yard, where it was incorporated into the barge. App. 15. Nichols paid for part of the steel delivered and became insolvent. The balance due Farwest remains unpaid.

2. **Federal Jurisdiction**. Farwest Steel Company filed an action in the United States District Court for the District of Oregon against the barge and her owners claiming a lien under 46 USC

§§971 or the Washington vessel lien law. The district court issued a warrant for the arrest of the vessel pursuant to FRCP Supplemental Rule C. The barge was arrested by the Marshal. The district court had jurisdiction pursuant to 28 USC §1333(1).

The owners answered, filed a claim, and moved to quash the arrest of the barge. After hearing the motion was allowed and the barge released. The owner consented to continued in rem jurisdiction. Farwest I, App. 36. Subsequent purchasers are bound by the doctrine of lis pendens. Farwest II, App. 64.

DISPOSITION BELOW

At the first trial, the district court held against Farwest's lien claim on the ground that the repair contractor, Nichols, was not authorized by the owner,

West Coast, to order steel so as to bind the barge.[1] App. 21-22.

On appeal, the court of appeals reversed and remanded to the district court for findings on the issue whether Farwest placed any reliance on the credit of the barge; if so, the court held that Farwest would have a lien. Farwest I, App. 46-49.[2]

On remand, the district court again

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[1] Alternatively, Farwest claimed a lien under the Washington vessel lien statute. The district court held that Farwest had no lien under the Washington statute, citing The Roanoke, 189 US 185 (1903)

[2] Farwest also filed an action in the Superior Court of Clark County, Washington, to foreclose state liens. The Washington Supreme Court held that the Washington Vessel Lien Law was preempted by the federal act. Farwest Steel Corp. v. DeSantis, 102 Wash. 2d 487, 687 P2d 207 (1984), cert. denied --- US ---, 105 S.Ct. 2024

denied Farwest's claim of lien. The court held that Farwest relied exclusively on the credit of Nichols and placed no reliance on the credit of the barge. App. 55.

Farwest appealed a second time. In Farwest II, a separate panel of the court of appeals held that it need not review the reliance issue because on reexamining the question whether Nichols was authorized to "bind the ship" the court found that Nichols was a general repair contractor, not an agent, and did not have sufficient management authority to bind the barge. Farwest II, App. 73-74. Farwest's petition for rehearing was denied. App. 75.

REASONS FOR GRANTING CERTIORARI

This case squarely presents the question whether, if ever, a supplier of

necessaries to a vessel for repairs, who does not deal directly with the owner, will be entitled to a lien.

The Ninth Circuit interpreted the Maritime Lien Act in a stricti juris manner that is in conflict with decisions of the Fifth Circuit. See, e.g., Equilease Corp. v. M/V Sampson, 793 F2d 598 (5th Cir. 1986) (en banc), cert. denied sub nom. Fred S. James & Co. of Texas v. Equilease Corp., ___ US ___, 107 SCt 570; Atlantic & Gulf Stevedores v. M/V Grand Loyalty, 608 F2d 197 (5th Cir. 1979).

Ship repairing is a major industry. Nationally, the value of repairs to commercial vessels in 1980 was $1,334,000,000; for 1981, it was $1,568,000,000; for 1982, it was $1,592,000,000; for 1983, it was $1,003,000,000; and for 1984, it was

$913,000,000.[3]

Suppliers of materials for ship repairs must be assured that they can rely on the authority of the repair yard to act for the owner when the yard orders materials for a specific vessel.

Ship repair is cyclical, seasonal, and very competitive. In view of the unique requirements of each vessel brought in for repairs, yards are unable to stock large inventories of materials and parts.

Downtime for repairs is very costly for vessel owners, so they expect quick turn-around time.

The decision of the court of appeals excludes an important class of maritime creditors, the suppliers and

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[3] The source of the foregoing information is Statistical Abstract of the United States, 1987.

subcontractors of ship repairmen, from the benefits of the Maritime Lien Act.

This Court has not accepted a case involving the Maritime Lien Act since 1940. The 1920 and 1971 amendments to the Act expressed a congressional policy favoring lien claimants. The court of appeals adhered to a policy of stricti juris announced by this Court prior to the 1920 amendment, in effect failing to carry out the subsequent intent of Congress.

ARGUMENT

I. HISTORY OF THE MARITIME LIEN ACT

Prior to the enactment of the Maritime Lien Act, there had been much confusion about whether suppliers at the home port were entitled to a lien on the vessel, and whether such a "home port" lien was enforceable in the federal

courts. Gilmore & Black, The Law of Admiralty, 2d Ed. (1975), pp. 642-652.

In 1910, in an effort to bring uniformity into maritime lien law and do away with the home port doctrine, Congress adopted the Maritime Lien Act. Act of June 23, 1910, c. 373, 36 Stat. 604.

> * * * [I]t was intended to operate in aid of those who supplied necessaries to ships and it correspondingly restricted the rights of the owners of the vessels. Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co., 310 US 268, 273 (1940).

Between 1910 and 1920, the Lien Act was generally given a narrow scope. For example, in Piedmont Coal Co. v. Seaboard Fisheries Co., 254 US 1 (1920), a pre-1920 amendment case, this Court held that the enactment of the Maritime Lien Act was not intended to broaden the scope of maritime liens. 254 US, at 11.

The Court stated:

> The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or purchasers without notice. It is therefore stricti juris and will not be extended by construction, analogy, or inference. 254 US, at 12.

In 1920, when the Merchant Marine Act was enacted, the Lien Act was broadened in reaction to restrictive interpretations by the courts. Gilmore & Black, The Law of Admiralty, 2d Ed. (1975), p. 657. Merchant Marine Act of June 5, 1920, c. 250, §30, subsections P-T, 41 Stat. 1005.

In 1971, Congress again acted to broaden the rights of lien claimants. Maritime Lien Act Amendmentof 8/10/71, 85 Stat. 285 (1971). Before the 1971 amendment, if the person claiming a lien knew or could have learned that the person in possession was limited by a

person in possession was limited by a contractual "no lien" clause, the lien claimant would be denied a lien. See U.S. v. Carver, 260 US 482 (1923). The 1971 amendment eliminated that requirement.

More broadly, the purpose of the 1971 amendment was to aid materialmen and other suppliers of necessaries to vessels. Atlantic Gulf Stevedores v. M/V Grand Loyalty, supra, 608 F2d, at 201, citing HR Rep. No. 92-340, 92d Cong., 1st. Sess., 1971 USCCA 1363, 1365.

II. FARWEST SUPPLIED STEEL TO THE VESSEL UPON THE ORDER OF THE OWNER OR A PERSON AUTHORIZED BY THE OWNER

Two sections of the Maritime Lien Act, sections 971 and 972, speak to the question whether Nichols' actions in ordering the steel for use in repairing the barge qualify Farwest for a lien. Section 971 is the basic section and

provides that persons (1) supplying necessaries (2) to a vessel upon the order (3) of the owner or a person authorized by the owner shall have a lien.

Section 972 sets forth a listing of persons who "shall be presumed to have authority." The list includes "the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted." Section 972 then defines the farthest limit of presumed authority by providing that: "No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel."

Farwest satisfied the literal terms of sections 971 and 972, but the courts below misinterpreted the statute and failed to appreciate the intent of

Congress and the explication of the Maritime Lien Act by this Court.

A. Farwest Supplied Necessaries.

The district court held that Farwest supplied necessaries. App. 16.

B. Farwest Furnished Steel to the Vessel.

The district court held that Farwest furnished steel to the vessel within the meaning of §971. App. 17.

C. The Steel Was Supplied Upon the Order of the Owner.

Section 971 is not couched in terms of "agency", but in terms of "authority." An agent's act would bind the owner personally; however, the authority contemplated in the Lien Act is broader. There need be no privity of contract between the owner and supplier. See The South Coast, 251 US 519 (1920).

Farwest argued before the district

court that the statutory language "upon the order of the owner" included an agent of the owner. The district court stated that West Coast would be bound if Nichols was an agent or if Nichols was a person authorized by the owner. App. 17. The district court held that Nichols was not the agent of the owner, nor authorized to order steel so as to bind the barge.

If Nichols ordered steel for the owner, then Nichols was an agent of the owner, and the order would be the owner's act and bind the vessel. Here, the barge repair contract provides:

> When supplies and materials purchased for use on or incorporation in the barge are delivered to Builder's [Nichols'] yard, title and right to possession of them shall pass forthwith to Customer [West Coast]. Upon termination of construction, Customer may (but is not required to) relinquish title of any unused supplies and

> materials to Builder and set off the cost thereof against any unpaid claims of Builder. (App. 10-11)

That Nichols was a general contractor does not answer the question. A contractor may be an independent contractor, i.e., not an agent of the owner, for some purposes, but an agent for other purposes. Restatement of Agency, 2d, §14N. SS Kresge Co. v. Port of Longview, 18 WaApp 805, 573 P2d 1336 (1977); Wilson v. Wilson, 53 Wa2d 13, 330 P2d 178 (1958); Rothchild Bros. v. Northern Pac. Ry. Co., 68 Wash 527, 123 Pac 1011 (1912). Here, Nichols was authorized to use the steel to repair the barge. Nichols was not authorized to resell the steel or use it for any other purpose, because on delivery it became the property of West Coast.

Nichols was therefore an agent when

the steel was delivered, and Farwest supplied steel "upon the order of the owner" within the contemplation of §971. Farwest is entitled to a lien.

D. **Alternatively, Nichols Was ". . . a Person Authorized by the Owner. . ."**

The district court concluded that Nichols was not a person authorized by the owner. App. 21-22.

In The Juniata, 277 F 438 (D. Md. 1922), a pre-1920 amendment case, the Court held that a subcontractor was not entitled to a lien because the subcontractor was dealing with the yard and not relying on the credit of the vessel. It is unclear whether the decision was a legal pronouncement that a subcontractor could never have a lien or whether it was based upon the particular facts of the case. In any event, until this case, The Juniata has never been

followed by a court of appeals. In Farwest II, the court of appeals relied on The Juniata and two other unpublished district court decisions for the proposition that there is no statutory basis for a subcontractor's claim of lien. App. 71. The court of appeals complicates analysis of the case because the Lien Act does not use the terms contractor or subcontractor, but only the phrase "person authorized by the owner."

In spite of the congressional policies expressed in the amendments to the Maritime Lien Act, the court of appeals has reverted to the pre-1920 stricti juris philosophy. See Foss Launch & Tow Co. v. Char Ching Shipping USA, 808 F2d 697, 702 (9th Cir. 1987). Foss was authored by the same judge who wrote the opinion in Farwest II which cites Foss. Farwest II, App. 65. The

Ninth Circuit acknowledged that it was in direct conflict with at least two other circuits in adopting the restrictive view it espoused. Foss, supra, 808 F2d, at 700-701.

The Farwest I panel, in contrast, reversed the district court's holding that Nichols was without authority. App. 39. In part, Farwest I relied on Atlantic & Gulf Stevedores v. M/V Grand Loyalty, supra. There the court reasoned:

> We view the legislative history of these sections to mandate a more liberal application than that which existed prior to the 1971 amendments to the Maritime Lien Act. Our review leads us inexorably to the conclusion that it was the intent of Congress to make it easier and more certain for stevedores and others to protect their interest by making maritime liens available where traditional services are routinely rendered. (Citation omitted) 608 F2d, at 201.

Report:

> Granting the materialman a lien encourages the prompt furnishing of necessaries to vessels so that they can be speedily turned around and put to sea. This is especially significant today when the emphasis on vessel performance is reduced port time and increased speed. 608 F2d, at 201,

and then continued:

> . . . Applying the stricti juris doctrine as done by the district court, would, in our view, stymie Congressional intent and have an unnecessary chilling effect on the free flow of commerce, adversely affecting people acting in good faith under demanding time constraints. 608 F2d, at 202.

E. NICHOLS WAS PRESUMED TO HAVE AUTHORITY BECAUSE NICHOLS WAS A PERSON TO WHOM MANAGEMENT WAS ENTRUSTED

The district court found that Nichols had temporary, but exclusive, physical control of the barge. App. 20. Nichols was obviously not a person

tortiously or unlawfully in possession or charge of the vessel. Nichols was thus well within the farthest reach of §972.

In Farwest II, The court of appeals said, referring to §972, that the "catch-all" category of "any person to whom the management of the vessel" is given would appear to reach the status of Nichols, the general repair contractor. App. 70. Yet the court went on to say:

> On the other hand, it cannot be said that acceptance of responsibility for a repair approximates a delegation of authority over the movements of a vessel. See Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co., 310 US 268, 279 (1940) ('Management is a broad [] term connoting direction and control for the purposes for which the vessel is used'). Congress could have enumerated the category of contractor for ship repairs under section 972 but did not do so. . . . App. 70-71.

With due respect, the Farwest II

court completely misread this Court's discussion and definition of management. The actual language this Court used in the Signal Oil case is as follows:

> . . . We think that the purpose of the statute is not properly served by construing the term 'management of the vessel' as referring to her navigation. Management is a broader term connoting direction and control for the purposes for which the vessel is used. . . .
>
> . . .
>
> The origin of the maritime lien is the need of the ship. Piedmont Coal Company v. Seaboard Fisheries Co., 254 US 1, 65 L ed 97, 41 S Ct 1, supra. The lien is given for supplies which are necessary to keep the ship going. . . Dampskibsselskabet Dannebrog v. Signal Oil & Gas Company of California, supra, 310 US, at 279-280.

As can easily be seen by comparing the actual language used by this Court with the language used by the lower court, the Ninth Circuit limited

management to a delegation of authority over the movements of the vessel. That holding drastically narrows the actual holding of this Court in Signal Oil. This Court's holding was that "management is a broader term connoting direction and control for the purposes for which the vessel is used." 310 US, at 279. However, Nichols was the person to whom the owner delegated exclusive control of the vessel in order to accomplish the owner's objective, repairing the barge.

III. FARWEST WAS NOT REQUIRED BY THE LIEN ACT TO PROVE RELIANCE ON THE CREDIT OF THE VESSEL

Because the court in Farwest II decided to review again the question of Nichols' authority, there has been no review of the district court's finding that Farwest did not rely on the credit

of the vessel. Section 971 says, ". . . it shall not be necessary to allege or prove that credit was given to the vessel."

On remand, the district court found as follows with respect to reliance:

> The Court of Appeals recognized that 'the district court could have concluded and did in fact conclude that despite concern about Nichols' ability to pay for the steel, Farwest was relying on Nichols for repayment. . .' . . . The district court adheres to that factual finding. Each of these parties knew that Nichols was a financial risk. Farwest sent Nichols alone a statement of monthly activity from which Nichols was to pay Farwest. The fact that Farwest consulted an attorney in order to deal with the risk of Nichols' financial insolvency does not affect the outcome in this case. While Farwest may have believed that it was entitled to a lien on the barge to protect its interest in materials delivered to Nichols, it is the objective factors and not the parties' subjective beliefs that are determinative here. The contracts and the

> dealings between the parties show that the barge owners intended to reimburse Nichols for the costs of barge repair and that Farwest was relying exclusively upon payment from Nichols for the materials supplied. App. 54-55. (Emphasis in original)

Before the Lien Act became law in 1910, the maritime law presumed against reliance on the credit of the vessel for services supplied at the home port. Gilmore & Black, The Law of Admiralty, 2d Ed. (1975), pp. 664-665. The Lien Act reversed that presumption in all cases. The 1971 Amendment to the Lien Act enhanced that presumption, for the benefit of lien claimants. Farwest I, App. 38.

The finding that Farwest relied solely on Nichols for payment is totally inconsistent with the finding that Farwest determined that Nichols was not

creditworthy. By adding nonstatutory requirements to the elements of a lien stated in §971, i.e., satisfying "objective" factors, the district court deprives lien claimants of the benefits of the Lien Act.

CONCLUSION

The state and federal courts have held, on preemption grounds, that state vessel lien laws are no longer available to maritime creditors. By its narrow construction of the Maritime Lien Act, the court of appeals has foreclosed creditors like Farwest from all lien remedies. This Court should grant Farwest's petition, reverse the decision below, and remand to the court of appeals

with directions to review the district court's findings on the reliance issue.

Respectfully submitted,

WILLIAMS, FREDRICKSON,
STARK & WEISENSEE, P.C.

Floyd A. Fredrickson

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FARWEST STEEL CORPORATION, a corporation, Plaintiff, and ROBERT A. BARNES, INC., a corporation; AIRWELD, INC., a corporation; McDONALD INDUSTRIES, INC., a corporation; and SHUMAN EQUIPMENT; Plaintiff-Intervenors, v. BARGE SEA-SPAN 241, aka BARGE CERES, her tackle, gear, and furnishings, in rem; and LAKEVIEW CHARTERS, S.A. DeSANTIS, WEST COAST CHARTERS, INC., a corporation; and NICHOLS BOAT & BARGE BUILDERS, INC., a corporation, in personam, Defendants.	Civ. No. 81-951-FR OPINION AND ORDER [Filed Jan. 26, 1984, USDC, Or Clerk]

FRYE, Judge:

The trial of this case has been submitted to the court upon the record and files, which include affidavits, transcripts, exhibits, memoranda and briefs, and objections to various evidentiary submissions.

As a preliminary matter, all of defendants' Objections and Motion to Strike are denied except for the objection to the court's consideration of the preliminary draft of the Barge Repair Contract. The court sustains defendant's objection to that offer of evidence. The court has also excluded from its consideration the legal conclusions of witnesses. Much testimony is also cumulative, but the court has based its decision upon that evidence it deems most probative and not upon how many times the evidence has been offered. Furthermore, the facts are basically undisputed by the

parties.

The following shall be deemed Findings of Fact and Conclusions of Law:

On June 18, 1980, Lakeview Charters (Lakeview) purchased the Barge SEASPAN-241, later renamed Barge CERES, hereinafter called BARGE. BARGE was an ocean-going vessel constructed of steel and was approximately 360 feet long, 75 feet wide, and had a depth of 25 feet. At the time Lakeview purchased BARGE, BARGE had been involved in a major casualty and was in need of substantial repairs and reconstruction.

On August 27, 1980, Lakeview contracted with Nichols Boat & Barge Builders, Inc. (Nichols) to repair BARGE. Thereafter BARGE was hauled to Nichols' yard in Vancouver, Washington. From August 27, 1980 through September, 1981, plaintiff Farwest Steel Corporation

(Farwest) and plaintiff-intervenors Roberts A. Barnes, Inc. (Barnes), Airweld, Inc. (Airweld), McDonald Industries, Oregon (McDonald), and Shuman Equipment (Shuman) supplied steel, sandblasting materials, welding supplies, rental equipment, and services to Nichols for the repair of BARGE.

Between March and June 1981, all of the interest in Lakeview, including BARGE, was transferred to defendant West Coast Charters, Inc. (West Coast). West Coast assumed the rights and liabilities of Lakeview under its contract with Nichols. West Coast then paid Nichols all that was owed for work done on the Lakeview-Nichols contract and also paid Nichols for work done on BARGE after West Coast became BARGE's owner.

In October, 1981, Nichols became financially unable to continue the work

on BARGE. West Coast completed the repairs. Many of Nichols' suppliers went unpaid.

Farwest and plaintiff-intervenors[1] claim that because they provided supplies to Nichols that were used on BARGE and for which they were never paid, they are entitled to proceed in rem against BARGE. They assert a maritime lien against BARGE under the Federal Maritime Lien Act, 42 U.S.C. §971, et seq.

Does this court have admiralty jurisdiction?

This court has admiralty

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[1] This opinion shall hereafter refer only to Farwest rather than Farwest and plaintiff-intervenors. The rulings as to Farwest shall also apply to plaintiff-intervenors because, while the exact circumstances of each plaintiff-intervenor are different factually from each other and from Farwest, there are no material factual differences that would be of any legal significance except for Transco NW and Shaver Transportation, whose liens are conceded by the parties.

jurisdiction if the agreement between Farwest and Nichols is a maritime contact [sic]. On November 14, 1981, the Honorable Edward Leavy, United States Magistrate, allowed West Coast's motion to quash Farwest's arrest of BARGE. This ruling was adopted by order of the Honorable Gus J. Solomon on November 18, 1981.[2]

The orders of Judges Leavy and Solomon are interlocutory orders and may be overruled by this court at any time prior to the entry of final judgment.

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[2] Judges Leavy and Solomon deemed BARGE a "dead ship" (See Order of November 14, 1981, page 2, line 19). A "dead ship" is not a maritime object and therefore not subject to admiralty jurisdiction. This court rejects the notion that BARGE was a "dead ship," and finds as a fact that it was a vessel, a maritime object. Since the agreement between Farwest and Nichols concerns the furnishing of necessaries to a specific vessel, a maritime object, it follows that the agreement between Farwest and Nichols is a maritime contract.

Insofar as the orders of Judges Leavy and Solomon hold that the agreement between Farwest and Nichols is a common law contract and not a "maritime contract," those rulings are overruled.

Even though the contract between Farwest and Nichols is a "maritime contract," it does not necessarily follow that Farwest will prevail. The court's ruling simply invokes admiralty jurisdiction and allows the court to determine whether Farwest is entitled to a maritime lien under the Maritime Lien Act, 46 USC §§971 and 972, so that Farwest may proceed in rem against BARGE.

ARE FARWEST'S CLAIMS WITHIN THE REQUIREMENTS OF THE MARITIME LIEN ACT?

Section 971 of the Maritime Lien Act provides in relevant part as follows:

> Any persons furnishing . . . necessaries . . . to any vessel . . . on the order of the owner of such vessel, or of a person authorized by the owner, shall

> have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Section 972 provides in relevant part as follows:

> The following persons shall be presumed to have authority from the owner to procure . . . necessaries for the vessel: the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. . . .

To determine whether Farwest's claims are within the requirements of the Maritime Lien Act, the following facts, again basically undisputed, are set out.

Lakeview retained Freddryck Barfuet, a naval architect, to execute plans for the repair of BARGE and to invite bids. Subsequently, John Murdock, a marine surveyor, was also retained to represent Lakeview.

The scope of the work to be done on BARGE is reflected in the bids: Northwest Marine Iron Works bid $2,078,067; Nichols bid $1,150,000; and Columbia Marine Construction bid $1,805.557. [sic] The job was awarded to Nichols despite the fact that Barfuet advised Lakeview that Nichols would probably have trouble with the job and Murdock advised Lakeview that he doubted that Nichols could do the job.

In light of the warnings of the naval architects and the marine surveyor, sections 20(e) and 20(f) were included in the Barge Repair Contract between Lakeview and Nichols:

> (e) Builder shall promptly pay all of its suppliers, contractors, laborers, other employees, materialmen, and tax authorities, and keep the barge free of all liens and encumbrances. If the payments required by this agreement have been made to Builder, or if

> adequate provision has been made therefor, Builder agrees to and does waive any claim of lien or possessory right to hold or fail to deliver the barge. Builder shall permit Customer to inspect its records to verify such payments.
>
> (f) When supplies and materials purchased for use on or incorporation in the barge are delivered to Builder's yard, title and right to possession of them shall pass forthwith to Customer. Upon termination of construction, Customer may (but is not required to) relinquish title of any unused supplies and materials to Builder and set off the cost thereof against any unpaid claims of Builder.

The Barge Repair Contract was followed by several change orders. The change orders nearly doubled the size of the project. The change orders were as follows:

Date	Amount	Purpose
18 Nov 80	$45,245	Sand/paint
3 Dec 80	138,633	Steel

24 Mar 81	472,000	House
24 Mar 81	18,900	Fence
21 May 81	425,000	Hopper

Upon receiving the bid to repair BARGE, Nichols asked Farwest if Farwest would be interested in supplying the steel. Farwest had previously supplied steel to Nichols, but not for several months. Farwest's credit manager, George Bradish, discussed the proposal with Will Nichols, one of Nichols' principals. Bradish conducted a credit check on Nichols. He found that Nichols was not creditworthy. Farwest's credit committee, consisting of Richard Jones, general manager, Charles Cooley, treasurer, and George Bradish, determined not to sell the steel to Nichols without first consulting with their lawyer and taking measures to ensure payment for the steel.

Since Farwest had had an unfortunate

financial experience with the Hillstrom Shipyard bankruptcy, it believed it needed to have some system to enable it to show that the steel it sold to Nichols had gone into an item on which it might later claim a lien. Based upon the advice of counsel and assuming that the Oregon and Washington boat lien statutes would provide a lien to secure payment for the steel, Farwest agreed to sell steel to Nichols on a monthly account basis. The Federal Maritime Lien Act (by name) was never mentioned or considered.

Farwest's sales personnel obtained Nichols' purchase order and job or project identification numbers for the BARGE when they were asked to quote prices on the BARGE steel. Farwest invoiced Nichols with each order and then at the end of the month sent a statement showing monthly activity. Nichols paid

on the basis of statement balances. Farwest delivered steel pursuant to Nichols' orders to the Nichols yard. Farwest made the deliveries and Nichols' employees receipted for each delivery. Nichols established a number system for the projects in the yard. Steel was segregated by job. Nichols used separate purchase orders for each project. When Nichols ordered steel, it ordered for a particular project, and Farwest was instructed to charge the steel to a particular job by using the number given by Nichols.

When the BARGE project started, Nichols kept Lakeview informed as to the expenses, invoices, and deliveries of steel, but the practice was never followed as it had been intended. Lakeview's representatives had access to Nichols' files and checked invoices and

went through papers. Lakeview, through representatives, inventoried the steel. Representatives of Lakeview visited Nichols' yard almost every day.

The weight estimate for steel in the house contract was 620,000 pounds, but an additional 286,000 pounds was required. Just under 500 tons were installed in the BARGE repair. The hopper was an additional 272,000 pounds.

Nichols paid $25,000 on November 23, 1980; $24,479 on January 27, 1981; $80,000 on March 19, 1981; $142,746.44 on April 29, 1981; and $87,295.87, the last payment, was received on June 29, 1981. The payments were applied against the oldest invoices first, and the last payment essentially paid the account through April 30, 1981. The balance due Farwest is for steel delivered to Nichols for BARGE during the period May-October,

1981. Farwest is also entitled to service charges and to prejudgment interest if the court concludes that it prevails.

The court must now decide these issues:

1. Was the steel supplied for the repair of BARGE a "necessary" within the meaning of section 971; and

2. If so, was the steel supplied for the repair of BARGE furnished to BARGE within the meaning of section 971; and

3. If so, was the steel supplied for the repair of BARGE and furnished to BARGE done so on the order of a person authorized by Lakeview?

As to (1) above, the steel supplied for the repair of BARGE was necessary in order to repair and rebuild BARGE for navigational purposes. The steel

supplied by Farwest constitutes a "necessary" within the meaning of section 971.

As to (2) above, Farwest delivered steel to Nichols' yard and dumped it in designated areas. It was then fabricated and incorporated into BARGE. The steel supplied for the repair of BARGE was furnished to BARGE within the meaning of section 971.

As to (3) above[3], the court must determine whether West Coast authorized Nichols to order steel from Farwest, or whether Nichols acted as West Coast's agent in ordering steel from Farwest, or whether Nichols ordered steel from Farwest simply as any general contractor orders supplies from a supplier in order

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[3] Farrell Ocean Services, Inc. v. United States, 681 F.2d 91 (1st Cir. 1982), relied upon by Farwest, does not address this crucial issue.

to meet its contractual obligations.

Four classes of people are statutorily presumed to have authority from a vessel's owner (presumably as the owner's agent) to order necessary supplies for a vessel: the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. Farwest contends that Nichols falls into the latter category.

Management of a vessel is not limited solely to navigation of the vessel, but it has a broader meaning connoting direction and control for the purposes for which the vessel is used. Dampskibsselskabet Danneborg v. Signal Oil & Gas Co., 310 U.S. 268, 1940 A.M.C. 647 (1940). Nichols did not have direction and control over BARGE as a hirer of the vessel or control and

management in any other way except to make repairs to rebuild BARGE.

"Management" is also that visible control in some person as would probably influence materialmen to the opinion that they were dealing with one having authority from the vessel's owner to order necessaries for the vessel. The Oceana, 233 F. 139 (9th Cir. 1916). Congress primarily intended to protect with a maritime lien American materialmen who furnished repairs and supplies to a vessel upon the order of a person who, in the eyes of the materialmen, had such physical and manual control over the vessel as to imply to the materialmen that this person had authority from the vessel's owner to order such supplies. In such case, the materialmen could promptly furnish supplies and get the vessel back to sea without taking the

time to be concerned about payment because, in the event the person ordering the repairs and supplies defaulted in payment and further, in the event the vessel's owner had not in fact given authority to the person and therefore could not be held responsible in personam, the vessel itself could be held responsible in rem.

In this case Nichols had temporary, but exclusive, physical control of BARGE. The purpose of the physical control was to repair and rebuild BARGE pursuant to its contract with West Coast. In order to fulfill its commitment to West Coast to repair and rebuild BARGE Nichols ordered steel from Farwest for use in repairing and rebuilding BARGE. Farwest sold steel to Nichols on a monthly account basis, looking to Nichols for payment. Both West Coast and Farwest

knew that dealing with Nichols was a financial risk. West Coast used its contract as a hedge against any losses. The contract provided that Nichols would pay all suppliers promptly and keep the vessel free of liens and encumbrances and that when supplies were delivered to Nichols' yard, title to the supplies passed to West Coast. Farwest attempted to deal with this risk by consulting a lawyer and by segregating and identifying the steel it sold to Nichols so as to be able to prove any lien that might arise. Each party assumed risks in dealing with Nichols. Pursuant to the contract, West Coast paid Nichols for all supplies furnished to BARGE and for all work performed by Nichols.

Under these facts, the court concludes that Nichols was not authorized by West Coast to order steel from Farwest

so as to bind BARGE; it further finds that Nichols was not an agent under agency principles of West Coast and it finds that Nichols was simply a general contractor who ordered steel from Farwest in order to fulfill its contractual promise to West Coast to repair and rebuild BARGE. Farwest's claims are not within the provisions of the Maritime Lien Act and no lien arises.[4]

DOES FARWEST HAVE A MARITIME LIEN AGAINST BARGE UNDER THE WASHINGTON VESSEL LIEN LAW?

Farwest does not have a maritime lien against BARGE under the Washington Vessel Lien Law. The Roanoke, 189 U.S. 185 (1903); Revised Code of Washington

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[4] When a lien does not arise under the Maritime Lien Act there is no presumption that credit is given to a vessel. In this case, if the court had found that West Coast authorized Nichols to order steel from Farwest, a presumption would have arisen that Farwest had given credit to BARGE.

60.36.010.

IT IS SO ORDERED this 26 day of January, 1984.

/s/ Helen J. Frye

United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FARWEST STEEL CORPORATION, a corporation, Plaintiff,

and

Robert A. Barnes, Inc., et al., Plaintiffs-Intervenors,

and

Shuman Equipment, Inc. Plaintiff-Intervenor-Appellant,

v.

BARGE SEA-SPAN 241, aka Barge Ceres, her tackle, gear and furnishings, in rem; Lakeview Charters; S.A. DeSantis, Defendants-Appellees.

FARWEST STEEL CORPORATION, a corporation, Plaintiff-Appellant,

and

Robert A. Barnes, Inc., a corporation, et al., Plaintiffs-Intervenors,

v.

BARGE SEA-SPAN 241, aka Barge Ceres, her tackle, gear and furnishings, in rem; Lakeview Charters; S.A. DeSantis; and West Coast Charters, Inc., a corporation, Defendants-Appellees.

Nos. 84-3754, 84-3755.

Argued and Submitted Nov. 9, 1984

Reargued July 22, 1985.

Decided August 23, 1985

Before FARRIS, ALARCON, and BEEZER, Circuit Judges.

FARRIS, Circuit Judge:

Farwest Steel and intervenor corporations appeal the judgment of the U.S. District Court for the District of Oregon, Frye, J., which refused to grant Farwest a maritime lien on the Barge SEA-SPAN 241. Farwest contends that because it furnished steel to the Barge at the request of a repair contractor hired by the Barge's owner, West Coast Charters, Farwest is entitled to a lien under either the federal Maritime Lien Act, 46 U.S.C. §§971-975, or the Washington vessel lien law, RCW 60.36.010 et seq.

Farwest commenced an action in rem

against the Barge in the district court. Farwest also brought an action in personam against West Coast, the Barge's owner; S. A. DeSantis, principal of West Coast; Lakeview Charters, the predecessor owner of the Barge; and Nichols, the repair contractor. West Coast made a general appearance and counterclaimed against Farwest for wrongful arrest of the Barge. In preliminary rulings, the district court quashed the arrest of the Barge, and dismissed the claims against DeSantis and Lakeview.

In the remaining actions against Nichols and West Coast, the district court held that it had admiralty jurisdiction based on the existence of a maritime contract. 28 U.S.C. §1333. The court also held that it continued to have in rem jurisdiction to decide Farwest's lien claim, despite the

quashing of the arrest and the subsequent sale of the Barge by West Coast to a nonparty, The Carnation Company. The court then ruled that Farwest and intervenor corporations did not have a lien under either the Maritime Lien Act, 46 U.S.C. §§971-975, or the Washington vessel lien law. RCW 60.36.010. It dismissed the claims against the Barge and West Coast's counterclaim for wrongful arrest. Farwest timely appeals.

Farwest also brought suit in the Superior Court of Clark County, Washington, to enforce state chattel and vessel liens against West Coast. That court, upheld by the Washington Supreme Court, see Farwest Steel Corp. v. DeSantis, 102 Wash.2d 487, 687 p.2d 207 (1984), cert. denied, --- U.S. ---, 105 S.Ct. 2024, 85 L.Ed.2d 305 (1985), dismissed Farwest's claim because federal

maritime law had preempted the state liens.

I. Subject matter jurisdiction.

[1] The district court had admiralty jurisdiction if it was adjudicating either a maritime lien, see Alyeska Pipeline Service Co. v. Vessel Bay Ridge, 703 F.2d 381, 384 (9th Cir. 1983), cert. dismissed, --- U.S. ---, 104 S.Ct. 3526, 82 L.Ed.2d 852 (1984), or a contract relating to the repair of an already constructed vessel. Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967, 970 (9th Cir. 1983); 28 U.S.C. §1333. Thus, even if we find that Farwest did not have a maritime lien on the Barge, the underlying contractual claim will support the district court's admiralty jurisdiction. See Aktieselskabet Fido v. Lloyd Braziliero, 283 Fed. 62, 73-74 (2d

Cir.), cert. denied, 260 U.S. 737-38, 43 S.Ct. 97, 67 L.Ed. 489 (1922); Reichert Towing Line, Inc. v. Long Island Machine & Marine Constr. Co., 287 Fed. 269 (E.D.N.Y. 1922) (subcontractor providing supplies directly to vessel would "no doubt" have a maritime contract); 1 Benedict on Admiralty §106, at 7-17, 18 (1983) (admiralty jurisdiction can arise from either a claim to enforce a maritime lien or "any claim in respect of the furnishing of repairs, supplies . . . or other necessaries to a vessel."). We therefore have jurisdiction over the timely filed appeal from the district court. 28 U.S.C. §1291.

II. The in rem jurisdiction of the district court.

Before considering the merits of Farwest's lien claim, we must determine whether the district court retained

jurisdiction over the Barge even after it quashed the vessel's arrest and permitted the Barge to be removed from the court's territorial waters.

[2] Under the prevailing rule, the release or removal of the res from the control of the court will terminate jurisdiction, unless the res is released accidentally, fraudulently, or improperly. United States v. $57,480.05 United States Currency and Other Coins, 722 F.2d 1457, 1458 (9th Cir. 1984); United States v. Vertol H21C Reg. No. N8540, 545 F.2d 648, 650 (9th Cir. 1976). Because the Barge began plying the waters between Washington and Hawaii shortly after it was sold to The Carnation Company on April 23, 1982, and there is no allegation that it was released improperly, under this rule the district court would have been deprived

of jurisdiction midway through its proceedings. The court's ensuing judgment that Farwest was not entitled to a lien would therefore be without a jurisdictional base, and we would only have appellate jurisdiction to review the dismissal of Farwest's in personam claim. See Alyeska Pipeline, 703 F.2d at 384; American Bank of Wage Claims v. Registry of District Court of Guam, 431 F.2d 1215, 1218 & n. 3 (9th Cir. 1970).

The rule that the vessel be present in order to preserve in rem jurisdiction is founded on "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." See Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 22-23, 80 S.Ct. 1470, 1473, 4 L.Ed.2d 1540 (1960). This fiction, however, has been referred to as

"archaic", "an animistic survivial from remote times," "irrational", and "atavistic", 364 U.S. at 23, 80 S.Ct. at 1473; and in several cases where vessel have been removed from their territorial reach, courts have "refused to myopically apply this fiction" of in rem jurisdiction. Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 334 (5th Cir. 1978); see Continental Grain, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (permitting transfer of a claim on an in rem admiralty action to a district in which the res was not present); Inland Credit Corp. v. M/T Bow Egret, 552 F.2d 1148, 1152, reh'g denied, 556 F.2d 756 (5th Cir. 1977); Reed v. Steamship Yaka, 307 F.2d 203 (3d Cir. 1962), rev'd on other grounds, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963).

These courts have derived jurisdiction to review an in rem decision from the existence of either consent or in personam jurisdiction over a shipowner whose other contacts with the forum satisfied "traditional notions of fair play and substantial justice," International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). When a claimant has consented to, or is otherwise subject to the court's in personam jurisdiction, these courts have suggested that due process is not violated by also finding in rem jurisdiction. Continental Grain, 364 U.S. at 22-23, 80 S.Ct. at 1472-73; Reed, 307 F.2d at 204-05; The Willamette, 70 Fed. 874 (9th Cir. 1895).

In all these cases, of course, the res, while beyond the court's territorial jurisdiction, was owned by a party

actually before the court, over whom the court already held in personam jurisdiction. In this case, both Farwest and West Coast would have us appropriate a res not only from a location beyond the court's territorial realm, but from a nonparty over whom the district court never had personal jurisdiction. We need not resolve this question since counsel at oral argument indicated that he had authority to speak for Carnation Company, the nonparty owner, and that Carnation had actual knowledge of the lien claim and had consented to in rem jurisdiction over the Barge. Alex L. Parks is an attorney at law. Parks approved and endorsed a pretrial order which says, in part:

> On or about April 23, 1982 West Coast Charters sold the barge CERES to The Carnation Company. There will be no claim that the sale to The Carnation Company was a sale to

> a purchaser without notice. The Carnation Company took the barge CERES subject to the claims of liens, if any, asserted herein and West Coast Charters has agreed to indemnify and hold The Carnation Company harmless from all claims of liens, if any. This case will be tried as if the barge had not been sold to The Carnation Company. If the Court enters a judgment in rem against the barge CERES in favor of the plaintiff and plaintiff-intervenors and the judgment is not paid, the Court may enter an order for seizure of the barge CERES and foreclosures of the liens. (Emphasis added).

Parks endorsed the pretrial order on behalf of defendants, Barge Sea-Span 241, aka Barge CERES, her tackle, gear and furnishings, in rem; West Coast Charters, Inc; and Nichols Boat & Barge Builders, Inc.

[3] The consent to in rem jurisdiction troubled us because Carnation was not a party to the proceedings. When combined with the fact

that during oral argument Parks acknowledged actual notice of the lien--thus removing any due process concerns about notice--we find from the record that Carnation consented to in rem jurisdiction. The district court retained jurisdiction over the Barge throughout its proceedings, and we have jurisdiction to review its in rem judgment.

III. Does Farwest have a maritime lien under the federal Maritime Lien Act?

The federal Maritime Lien Act grants a maritime lien to any person 1) furnishing repairs, supplies, or other necessaries 2) to any vessel 3) "upon the order of the owner of such vessel, or of a person authorized by the owner." 46 U.S.C. §971. The district court found that Farwest and intervenor corporations did not qualify for a federal lien

because the appellants failed to satisfy the third requirement of section 971: they had not acted upon the order of a person authorized to purchase steel on the owner's behalf, either as an agent or as a contractor.

Our analysis must proceed under the Lien Act's presumption in favor of materialmen for all repairs, supplies, and other necessaries ordered. The Oceana, 244 Fed. 80, 82 (2d Cir.), cert. denied sub nom. Morse Dry Dock & Repair Co. v. Conron Bros. Co., 245 U.S. 656, 38 S.Ct. 13, 62 L.Ed. 533 (1917); see Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co., 310 U.S. 268, 273, 60 S.Ct. 937, 940, 84 L.Ed. 1197 (1940). This presumption was enhanced in 1971 when Congress deleted the requirement that materialmen inquire about the existence of any no-lien clauses before

furnishing supplies to a contractor. See Atlantic & Gulf Stevedores v. M/V Grand Loyalty, 608 F.2d 197, 201-02 (5th Cir. 1979) (legislative history of 1971 amendments requires a liberal application of Lien Act); Ray, Maritime Contract Liens, 47 Tul. L. Rev. 587, 591 (1973) 'Applying the clearly erroneous standard of review to the trial court's finding that Nichols was not a "person authorized by the owner" of the Barge to order steel from Farwest, see United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert denied., --- U.S.---, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984) (mixed questions of law and fact in which the factual inquiry predominates are subject to clearly erroneous review), we reverse and remand."

Of the three elements of section 971, the first two are not in real

dispute here. The term "necessaries" under section 971 refers to "supplies which are necessary to keep the ship going," Signal Oil & Gas, 310 U.S. at 280, 60 S.Ct. at 943 (1940). The steel that Farwest supplied was essential for the Barge's repairs and eventual return to service. See Farrell Ocean Services, Inc. v. United States, 681 F.2d 91, 92-93 (1st Cir. 1982); Equilease Corp. v. M/V Sampson, 568 F.Supp. 1259, 1263 (E.D. La. 1983), aff'd, 742 F.2d 852 (5th Cir. 1984) (terms of section 971 should be given a broad meaning, and include supplies or services "reasonably needed in a ship's business"). The record satisfies us that the trial court correctly found that the steel was supplied "to' the Barge. It was brought to Nichols' yard and delivered to designated areas for incorporation into

the Barge. See The Yankee, 233 Fed. 919, 925 (3d Cir. 1916), cert. denied sub nom., Rivers & Harbors Improvement Co. v. Latta, 243 U.S. 649, 37 S.Ct. 476, 61 L.Ed. 946(1917) (delivery of supplies to vessel's side meets statutory standard).

[4] The dispositive issue is whether the third element of section 971 was satisfied: was Nichols a "person authorized by the owner" of the Barge to order steel from Farwest? Under 46 U.S.C. §972, "persons authorized by the owner" shall be presumed to include "any person to whom the management of the vessel at the port of supply is intrusted." The district court concluded that (1) Nichols was not a person "to whom the management of the vessel ... is entrusted," and (2) that Nichols was a general contractor who ordered steel on its own rather than on the barge owner's

behalf. Because we reverse and remand on the basis of the court's second conclusion, we need not determine whether Nichols was entrusted with management of the vessel.

Courts have refused to grant a maritime lien to a subcontractor who has furnished supplies to the primary contractor responsible for servicing a ship. "[B]ecause it can rarely be shown that the contractor was not acting as a contractor but as the agent of the owner, a subcontractor will normally not be entitled to a lien since he extends credit to the contractor and not the ship." AAB Electric Industries, Inc. v. Control Masters, Inc., 1980 AMC 1795, 1801 (E.D.La. 1980)(quoting 2 Benedict on Admiralty, 3-39, n. 2(7th Ed.1975)). If Nichols was an independent contractor free to make his own arrangements with

suppliers, then his steel purchases cannot later be assessed against the barge--unless the seller of the steel relied on the barge as security. Id.; see also Inland Credit Corp., 552 F.2d at 1152 (lien available if the advance was made "on the credit of the ship"); The Juniata, 277 Fed. 438, 440 (D.Md. 1922). Where the supplier relies on the contractor and not the barge as a source of payment, a maritime lien will be denied. 277 Fed. at 440; see In re Marine Transit Corp., 94 F.2d 7, 9 (2d Cir. 1938); see also W. A. Marshall & Co. v. S. S. President Arthur, 279 U.S. 564, 570-71, 49 S. Ct. 420, 422, 73 L.Ed. 846 (1929).

Here, there are facts from which the district court could have concluded and did in fact conclude that despite concern about Nichols' ability to pay for the

steel, Farwest was relying on Nichols for repayment, and that the barge's owner viewed Nichols as an independent contractor. After delivering the steel to Nichols' shipyard pursuant to Nichols' orders, Farwest invoiced Nichols alone for each order of steel. At the end of the month, Farwest sent to Nichols alone a statement of monthly activity. Nichols paid on the basis of statement balances. Pursuant to the contract between Nichols and the original barge owner, Nichols was to keep the owner informed of all expenses, invoices, and deliveries of steel. In fact, this was not done. Neither the originals nor copies of the invoices and statements of monthly activity were sent by either Nichols or Farwest to the barge owner. Nonetheless, West Coast paid Nichols for all supplies furnished to the barge and for all work

performed by Nichols.

On the other hand, prior to dealing with Nichols, Farwest consulted a lawyer in an attempt to insure itself against the risks of dealing with Nichols. As the district court noted, Farwest then took numerous steps to segregate and identify the steel it sold to Nichols "so as to be able to prove any lien that might arise." Similarly, the barge owner also attempted to hedge against any losses by a provision in its repair contract providing that Nichols would pay all suppliers and keep the vessel free from liens. These facts suggest that Farwest relied on the Barge and that West Coast viewed Nichols as an agent whose expenses could ultimately be attributable to West Coast.

Whether Farwest placed any reliance on the Barge is a question of fact. We

must remand to resolve that factual issue. If the district court finds that Farwest relied exclusively on Nichols, under "the Juniata rule" it must deny Farwest a federal lien. See AAB Electric Industries, Inc., 1980 AMC at 1802 ("[h]aving relied solely upon the credit of Control Masters in performing the work on the generator, AAB Electrical did not obtain a maritime lien"); The Juniata, 277 Fed. 438, 440 (D.Md. 1922) ("the subcontractor extended credit to the contractor, and never thought of seeking to hold any one else liable . . . the subcontractor gave credit to the contractor, and looked to it, and not to the ship"); The Juniata, 277 Fed. 441, 442 (D. Md. 1922) ("I find, as a matter of fact, that the subcontractor contracted solely with the contractor and

extended credit solely to it").[1]

However, if the district court finds that Farwest placed some reliance on the Barge, under the statutory presumption in favor of materialmen under the Lien Act, see Atlantic & Gulf Stevedores, 608 F.2d at 201-02 (5th Cir. 1979); Inland Credit Corp., 552 F.2d at 1152 (citations omitted); The Oceana, 244 Fed. 80, 82 (2d Cir.), cert. denied sub nom. Morse Dry Dock & Repair Co. v. Conron Bros. Co., 245 U.S. 656, 38 S. Ct. 13, 62 L.Ed. 533 (1917), Farwest is entitled to a federal lien. See Sands Const. Co. v. United

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[1] We do not reach the issue whether Farwest is entitled to a lien under Washington state law. After the parties filed their briefs, the Washington Supreme Court determined that, assuming that state lien statutes were not preempted by federal law, Farwest would not be entitled to a lien under state law. Farwest Steel Corp. v. DeSantis, 102 Wash.2d 487, 491-92, 687 P.2d 207 (1984), cert. denied, --- U.S. ---, 105 S.Ct. 2024, 85 L.Ed.2d 305 (1985).

Virginia Bank, --- F.Supp. ---, --- ---- - 1985 A.M.C. 1165, 1169-70 (E.D. Va. 1984) citing The Defiance, 3 F.2d 48, 51 (E.D.N.C. 1924); Diaz v. The S.S. Seathunder, 191 F.Supp. 807, 816 (D.Md. 1961)); see also Farrell Ocean Services, 681 F.2d 91 (granting lien to subcontractor who supplied transportation services to repair contractor); Shaw v. 46-foot ChrisCraft Camelot, 391 F. Supp. 1026 (W.D.Wa. 1975); The Ark, 17 F.2d 446 (S.D. Fla. 1926); The Schuylkill, 249 Fed. 781, 782 (E.D.N.Y. 1918). In that case, having retained in rem jurisdiction over the Barge despite the vessel's removal, the district court is authorized to arrest the Barge and foreclose the lien of Farwest and intervenor corporations.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FARWEST STEEL CORPORATION, a corporation, Plaintiff, and ROBERT A. BARNES, INC., a corporation; AIRWELD, INC., a corporation; McDONALD INDUSTRIES, INC., a corporation; and SHUMAN EQUIPMENT; Plaintiff-Intervenors; v. BARGE SEA-SPAN 241, aka BARGE CERES, her tackle, gear, and furnishings, in rem; and LAKEVIEW CHARTERS, S.A. DeSANTIS, WEST COAST CHARTERS, INC., a corporation; and NICHOLS BOAT & BARGE BUILDERS, INC., a corporation, in personam, Defendants.	Civ. No. 81-951-FR ORDER [FILED Feb. 14, 1986, USDC, Or. Robert M. Christ, Clerk]

FRYE, Judge:

On January 26, 1984, this court

entered findings of fact and conclusions of law holding that plaintiff and plaintiff/intervenors were not entitled to a lien on the barge SEA-SPAN 241 in order to satisfy debts owed to them by Nichols Boat & Builders, Inc. (Nichols). In its findings and conclusions the court stated:

> Under these facts, the court concludes that Nichols was not authorized by West Coast to order steel from Farwest so as to bind BARGE; it further finds that Nichols was not an agent under agency principles of West Coast and it finds that Nichols was simply a general contractor who ordered steel from Farwest in order to fulfill its contractual promise to West Coast to repair and rebuild BARGE. Farwest's claims are not within the provisions of the Maritime Lien Act and no lien arises.
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> Findings of Fact and Conclusions of Law, p. 12.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded, directing this court to

determine:

> Whether Farwest placed any reliance on the Barge is a question of fact. We must remand to resolve that factual issue. If the district court finds that Farwest relied exclusively on Nichols, under "the Juniata rule" it must deny Farwest a federal lien. . . . However, if the district court finds that Farwest placed some reliance on the Barge, under the statutory presumption in favor of materialmen under the Lien Act, . . . Farwest is entitled to a federal lien. (Citations omitted). C.A. No. 84-3755 Opinion pp. 11-12.

The relevant facts are stated in this court's opinion of January 26, 1984 and will not be repeated here. As the court of appeals recognized, the dispositive issue in this case is whether the third element of 46 U.S.C. §971 has been satisfied: Was Nichols a "person authorized by the owner" of the barge to order steel from Farwest? Under 46 U.S.C. §972, "persons authorized by the owner" shall be presumed to include "any

person to whom the management of the vessel at the port of supply is intrusted."

In its opinion of January 26, 1984, this court concluded that Nichols was not a person to whom "the management" of the vessel at the port of supply was entrusted. The court concluded that Nichols was a general contractor who ordered steel on its own behalf rather than on the barge owner's behalf. The court of appeals found the court's conclusion that Nichols was a general contractor who ordered steel on its own behalf to be clearly erroneous and remanded the case for this court to make a determination as to whether or not plaintiffs relied exclusively upon Nichols for payment.

The court of appeals recognized that "the district court could have concluded

and did in fact conclude that despite concern about Nichols' ability to pay for the steel, Farwest was relying on Nichols for repayment . . . " (Emphasis added). C. A. No. 84-3755, Opinion p. 10. The district court adheres to that factual finding. Each of these parties knew that Nichols was a financial risk. Farwest sent Nichols alone a statement of monthly activity from which Nichols was to pay Farwest. The fact that Farwest consulted an attorney in order to deal with the rick of Nichols' financial insolvency does not affect the outcome in this case. While Farwest may have believed that it was entitled to a lien on the barge to protect its interest in materials delivered to Nichols, it is the objective factors and not the parties' subjective beliefs that are determinative here. The contracts and the dealings between the

parties show that the barge owners intended to reimburse Nichols for the costs of barge repair and that Farwest was relying exclusively upon payment from Nichols for the materials supplied.

Farwest does not have a maritime lien against the barge under the Washington Vessel Lien Law.

IT IS SO ORDERED this 14 day of February, 1986.

/s/ Helen J. Frye
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FARWEST STEEL CORPORATION, a corporation, Plaintiff-Appellant, and SHUMAN EQUIPMENT, INC., Plaintiff-Intervenor-Appellant, v. BARGE SEA-SPAN 241, aka BARGE CERES, her tackle, gear, and furnishings, in rem; and WEST COAST CHARTERS, INC., a corporation; Defendants-Appellees.	Nos. 86-3668; 86-3735 D.C. No. CV 81-951 FR

Argued and Submitted
July 9, 1987 -- Portland, Oregon

Filed September 18, 1987

Before: M. Oliver Koelsch, and Alfred T. Goodwin, Circuit Judges, and Thelton E. Henderson,* District Judge.

Opinion by Judge Goodwin

Appeal from the United States District Court for the District of Oregon
Helen J. Frye, District Judge, Presiding

*Honorable Thelton E. Henderson, United States District Judge, Northern District of California, sitting by designation.

OPINION

GOODWIN, Circuit Judge:

In this comeback[1] case, Farwest Steel Corporation ("Farwest") and an intervenor corporation appeal the district court's refusal to grant Farwest a maritime lien on the Barge Sea-Span 241. We hold that Farwest failed to establish a maritime lien because it did not supply steel on the order of the barge's owner or of a person authorized by the owner within the meaning of 46 U.S.C. §971.

In June 1980, Lakeview Charters bought the Barge Sea-span 241, later renamed Barge Ceres (hereinafter "the barge"). The barge needed extensive

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[1] Farwest Steel Corp. v. Barge Sea-Span 241, 769 F.2d 620 (9th Cir. 1985)

repairs and reconstruction. In August 1980, Lakeview contracted for repairs with Nichols Boat and Barge Builders, Inc., and had the barge towed to Nichols' yard in Vancouver, Washington. Nichols in turn subcontracted with various suppliers, including Farwest and Shuman Equipment[2] for the purchase of equipment and supplies to repair the barge.

In the spring of 1981, West Coast Charters, Inc. bought Lakeview and all its interests. West Coast obtained title to the barge and assumed the rights and liabilities of Lakeview under the repair contract with Nichols. West Coast then paid Nichols all that was owed for work done on the Lakeview-Nichols contract and

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[2] As the interests of Farwest and Shuman, plaintiff-intervenor, are identical for purposes of this appeal, we will refer to them collectively as Farwest.

also paid Nichols for work done on the barge after West Coast assumed title.

In October 1981, Nichols became financially unable to continue work on the barge, and West Coast completed the repairs. Many of Nichols' suppliers went unpaid.

Farwest arrested the barge and brought this action in the district court asserting two bases of relief. First, Farwest sought an in rem maritime lien judgment against the barge for the value of the steel and other supplies. Second, Farwest sought an in personam judgment for the value of unpaid supplies against Nichols, Lakeview and West Coast. The district court quashed the arrest of the barge, by interlocutory order, reasoning that the repair contract was not a maritime contract, and therefore federal courts would lack jurisdiction over the

action.

At trial before another judge, the district court held that the repair contract was a maritime contract and that jurisdiction existed in the federal courts. However, the district court also held that Farwest had failed to establish entitlement to a lien. The court determined that under the Federal Maritime Lien Act, 42 U.S.C. §971 et seq ("FMLA"), Nichols lacked authority to bind the ship on behalf of supply subcontractors.

Farwest appealed the denial of the lien to this court. In Farwest Steel Corp. v. Barge Sea-Span 241, 769 F.2d 620 (9th Cir. 1985) (Farwest I), we began by considering whether federal in rem jurisdiction over the barge survived the quash order, the failure to post a bond, and the sale of the barge to Carnation

Company, a nonparty. We determined that jurisdiction had not been lost because the defendant's lawyer at oral argument stated that he was authorized to consent to in rem jurisdiction on behalf of Carnation. On the merits, we were unable to decide the question of entitlement to a lien without the benefit of further factfinding as to the degree of Farwest's reliance on the credit of Nichols. We reversed and remanded the matter to the district court for factfinding on the reliance question.

The district court, on remand, found as a fact that Farwest had relied exclusively on the credit of Nichols and not at all on the credit of the barge. As a consequence, the district court denied the lien. Farwest appeals.

[1] Since Farwest I, ownership of the barge has twice changed hands. In

late 1984, Carnation sold the barge to Sause Brothers Ocean Towing Company, Inc., which in turn later sold the vessel to Manna Pro Corporation. Neither Manna Pro nor Sause Brothers has ever consented to in rem jurisdiction. It is now again contended that the sale of the vessel to a party who, unlike Carnation, has not consented to in rem jurisdiction over the vessel, divests in rem jurisdiction. We are not persuaded.

[2] It is true that the release or removal of a vessel from the federal court's control generally terminates in rem jurisdiction unless a release was the result of mistake, fraud or other impropriety. American Bank of Wage Claims v. Registry of the District Court of Guam, 431 F.2d 1215, 1218-19 (9th Cir. 1970). As we held in Farwest I, however, a further exception is

established by the consent of the vessel's owner to in rem jurisdiction. Farwest, 769 F.2d at 622. In addition, under the doctrine of lis pendens, it is well established that one who buys property that is the subject of litigation assumes all the risks and burdens of the seller with regard to the pending case. Restatement of Judgments 2d §44 (1980). Cf. Sheppard v. Taylor, 30 U.S. 675, 712 (1831). The lis pendens rule applies even if, as is contended here, the buyer was unaware of the pendency of the litigation involving the property purchased. See Restatement of Judgments 2d §44 comment 1 (purchaser better able to protect himself vis-a-vis seller than the lien claimant). Thus, we hold that the sale of the barge, subsequent to Farwest I, to the Sause Brothers and Manna Pro nevertheless does

not invalidate the in rem jurisdiction consented to by the prior owner Carnation.

[3] Entitlement to a federal maritime lien is established by proof of the elements of the federal maritime lien statute, 46 U.S.C. §971 (1982). Section 971 provides:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Id. Thus, to prevail, lien claimants must have "(1) furnish[ed] repairs, supplies, or other necessaries, (2) to any vessel, (3) 'upon the order of the owner of such vessel, or of a person authorized by the owner.'" Foss Launch &

Tug Co. v. Char Ching Shipping U.S.A., Ltd., 808 F.2d 697, 699 (9th Cir. 1987).

[4] In this action, it is not disputed that Farwest furnished necessaries to the barge within the meaning of section 971. The element in dispute is whether Farwest provided steel supplies to the vessel upon the order of an authorized person. West Coast contends that Nichols ordered the steel and was not at that time a "person authorized by the owner" of the barge within the meaning of section 971 because Nichols was entrusted solely with authority to repair the barge and never with management authority over the vessel.

[5] The law of the case doctrine posits that matters decided on appeal cannot be relitigated in a later appeal of the same case, unless the original

panel made a plain error of law. Appleton Electric Co. v. Graves Truck Line, Inc., 635 F.2d 603, 607 (7th Cir. 1980), cert. denied, 451 U.S. 976 (1981). Farwest contends that the question of the extent of Nichols' authority for purposes of section 971 was correctly determined in Farwest I. In Farwest I, however, we did not reach the issue. We simply stated that Farwest would be entitled to a lien if it could prove that it relied at least partly on the barge for payment, remanding for factfinding on the existence of such reliance. Thus, even if our language in Farwest I implied that Nichols' status as an authorized person turned on whether reliance on the vessel could be established, closer inspection of the FMLA reveals that the inquiries are independent.

Whether Nichols was authorized by

the barge owner to procure necessaries is an entirely different question from whether Farwest relied at least partly on the credit of the barge when supplying steel to Nichols for use on the barge. The former is a necessary element of section 971. The latter is a defense by which a party may show that a lien claimant has "waived" entitlement to a lien. 46 U.S.C. §974 (1982). Such a waiver may occur as a result of exclusive reliance on a source of payment other than the credit of the vessel. See, e.g., Equilease Corp. v. M/V Sampson, 793 F.2d 598, 606 (5th Cir.) (en banc) (waiver of lien occured [sic] as a result of claimant's exclusive reliance on personal credit of vessel owner), cert. denied, 107 S. Ct. 570 (1986).

[6] Thus, although section 974 permits a party to rebut a lien

claimant's entitlement to a lien by showing waiver (i.e., nonreliance on the vessel), the question of reliance is properly considered only after a claimed lien has met the requirements of section 971. Therefore, in Farwest I, if we suggested that Farwest could satisfy the "authorized person" requirement of section 971 by showing reliance on the credit of the vessel, we led the parties astray. Farwest was never relieved of a legal duty to show that the barge owner authorized Nichols to bind the ship to pay for necessaries. As a consequence, we are not bound by the law of the case doctrine in this appeal with respect to the section 971 analysis because in Farwest I we did not address the question whether the district court erred in holding that Nichols did not qualify as an authorized person within the meaning

of section 971. We now belatedly turn to that inquiry.

[7] The scope of the phrase "person authorized by the owner" is clarified in 46 U.S.C. §972 (1982). That section provides that:

> The following persons shall be presumed to have authority from the owner to procure . . . necessaries for the vessel: the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. Id. (emphasis added).

Of the four enumerated categories, the fourth "catch-all" category would at first reading appear to reach the status of Nichols' the general repair contractor. On the other hand, it cannot be said that acceptance of responsibility for a repair approximates a delegation of authority over the movements of a vessel. See Dampskibsselskabet Dannebrog v.

Signal Oil & Gas Co., 310 U.S. 268, 279 (1940) ("Management is a broad [] term connoting direction and control for the purposes for which the vessel is used"). Congress could have enumerated the category of contractor for ship repairs under section 972 but did not do so. Indeed, solely on the face of section 972, a subcontractor would be ill-advised to expect any source of repayment other than the credit of the general contractor.

[8] More important, in a line of cases beginning with The Juniata, 277 F. 438, 440-41 (D. Md. 1922), where subcontractor suppliers have sought federal maritime liens, courts interpreting section 972 have uniformly held that the general repair contractor was not endowed with sufficient "management" authority to support a

section 971 lien. Sands Construction Co., Inc. v. United Virginia Bank, 1985 AMC 1165, 1167 (E.D. Va. 1984); AAB Electrical Ind. v. Control Masters, 1980 AMC 1795, 1799-1801 (E.D. La. 1980). See generally, Daigle and Scowcroft, "Payment for Services and Supplies Furnished in Maritime Commerce," 18 J. Mar. L. & Comm. 219, 240 (April, 1987).

A leading treatise summarizes the case law rule as follows:

> [B]ecause it can rarely be shown that the contractor was acting not as a contractor but as the agent of the owner, a subcontractor will normally not be entitled to a lien since he extends credit to the contractor and not the ship.
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> 2 Benedict on Admiralty §38 n.2 (7th Ed. 1986).

The sole exception to the rule against the subcontractor lien will occur where the subcontractor has been engaged by a general contractor in circumstances where

the general contractor was acting as an agent at the direction of the owner to engage specific subcontractors for repairs. See Marine Coatings of Alabama, Ltd. v. United States, 792 F.2d 1565, 1569 (11th Cir. 1986) (dictum); Sands Construction, 1985 AMC at 1167. See also Shaw Marine Service v. 46-foot Chris-Craft Camelot, 391 F.Supp. 1026, 1028 (W.D. Wash. 1975); Gunby Co. v. S.S. Willy, 1942 AMC 932, 933 (D. Md. 1942).

[9] Here, Nichols' status was that of an independent contractor for repairs rather than of an agent for the owner. The only evidence that tends to show direct authorization for the engagement of subcontractors is a provision in the contract between Nichols and the vessel owner to the effect that any supplies obtained by Nichols for repairing the vessel would become the property of the

vessel owner. This provision, however, does not suffice to prove section 971 authority. It may simply have been an attempt by the owners to hedge against any losses. There simply is no significant evidence in the record which indicates that (1) Nichols was acting as anything other than an independent repair contractor, or (2) that the owner intended that Farwest Steel be engaged as a subcontractor.

We hold that Nichols was not an authorized person within the meaning of section 971. We therefore affirm the denial of the a federal maritime lien.

Affirmed.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FARWEST STEEL CORPORATION, Plaintiff-Appellant, and SHUMAN EQUIPMENT, INC., Plaintiff-Intervenor-Appellant, v. BARGE SEA-SPAN 241, aka BARGE CERES, her tackle, gear, and furnishings, in rem; and WEST COAST CHARTERS, INC., a corporation; Defendants-Appellees.	Nos. 86-3668 86-3735 D.C. CV 81-951 FR ORDER [FILED Dec. 7, 1987, Cathy Catterson, Clerk, U.S. Ct. of Appeals]

BEFORE: KOELSCH and GOODWIN, Circuit Judges, and HENDERSON*, District Judge.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the petition for rehearing and suggestion for

rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. [Fed. R. App. P. 35.]

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* The Honorable Thelton E. Henderson, United States District Judge for the Northern District of California, sitting by designation.